In the Supreme Court

of the United States

October Term, 1959

No.

ST. JOHNS MOTOR EXPRESS CO.,
JAMES J. WILLIAMS, INC., and
CONSOLIDATED FREIGHTWAYS, INC.,
Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
EVERTS' COMMERCIAL TRANSPORT, INC., and
INLAND PETROLEUM TRANSPORTATION
COMPANY, INC.,
Appellees.

MOTION TO AFFIRM

On Appeal from the United States District Court for the District of Oregon

Appellee Everts' Commercial Transport, Inc., pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (Juris. St. pp. 15-16) dismiss-

ing the appellants' complaint and sustaining the report and order of the Interstate Commerce Commission in its Dockets MC-25643 (Subs 36 and 41) entitled Everts' Commercial Transport, Inc., Extension—Bulk Commodities, and MC-88161 (Sub 48) entitled Inland Petroleum Transportation Company, Inc., Extension—Bulk Commodities; now reported together with seven other Commission dockets under the title *Everts' Commercial Transport, Inc., Extension—Richmond* at 78 M.C.C. 717.

EVERTS' is a motor common carrier that has specialized in the tank truck transportation of bulk acids and chemicals since 1947. Its initial authority, plus some thirty-odd extensions granted by the Interstate Commerce Commission, authorized the transportation of what might be termed specific rather than generic commodities, and between points, counties, or areas of states rather than between wider territorities that would embrace one or several states as a whole. With what it contends was and still is a rapid expansion of the chemical industry on the Pacific Coast, attendant with a broadened spectrum of acid and chemical commodities being, and to be, produced at plants throughout the Pacific Coast area and to be marketed to a diverse and expanding market throughout the same area, EVERTS filed its application in Commission Docket MC-25643, Sub 41.

EVERTS' Sub 41 application was for an extension of its then existing certificate authorities. This application also embraced authorities sought in pending applications: Sub 32 for Methanol from California counties to points in Oregon and Washington; and Sub 36 for

Phenol from Contra Costa County, California, to points in Oregon and Washington. EVERTS' Sub 41 sought broad commodity authority in asking for generic commodities, i.e., "acids, coal-tar products, chemicals and chemical solutions, and petro-chemicals," to provide it with sufficient commodity authority to keep pace with the new developments within the chemical industry. It requested authority within the area of a natural group of states in which it already had extensive operations, but for a sufficiently broad area-wide grant as to provide it with a natural territorial coverage for its chemical customers.

EVERTS' Sub 41 hearing was held at Portland commencing May 3, 1956. It had the support of large chemical concerns located on the Pacific Coast, and the support also of INLAND and of Pacific Truck Service, the latter a motor common carrier of acids and chemicals domiciled in California. It was opposed by various rail and motor carriers, all of whom were fully heard, and many of whom, as their interests indicated to them, participated in the balance of the case through its reconsideration by the entire Commission.*

Subsequent to the hearing the Commission's Examiner recommended denial and EVERTS filed exceptions. The Commission's Division 1 thereafter decided in favor of a large part of the application and issued its report to that effect under date of September 10, 1957. The report of Division 1 is attached to EVERTS'

*The transcript of testimony in Everts' Sub 41 before the Commission covers 555 pages, and 42 exhibits were offered, all but one of which were received.

Answer as Appendix A (Notice of Appeal Item 3), and is reported in 72 M.C.C. 599.

Thereafter, some of the opposition, including the appellants herein, petitioned for reconsideration by the whole Commission and the same was granted. The Commission thereafter made its decision of January 19, 1959, in which it granted to EVERTS motor common carrier authority to transport acids and chemicals in bulk between points in California, Oregon, and Washington. It is the latter Order (78 M.C.C. 717), as it applies to EVERTS and INLAND, which was unanimously sustained by the three-judge District Court in the judgment of April 27, 1959.

The Commission's lengthy decision of sixty pages (including appendices) contains numerous findings of fact from the evidence adduced in the EVERTS and INLAND hearings, and contains also the necessary ultimate findings required by section 207 (a) of the Interstate Commerce Act. The ultimate findings that must be made by the Commission are:

(1) " * * * that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and

(2) "that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity;

"otherwise such application shall be denied." (49 U.S.C. Sec. 307 (a))

That the Commission did, with consummate care,

match the very substantial evidence contained within the records with the various criteria used in reaching a careful decision on each of these ultimate findings, is commended to this Court by the unanimous opinion of the three-judge District Court in sustaining the Commission completely.

Appellants allege that the District Court ignored three of their questions. However, the transcript of oral arguments heard below, including oral opinions expressed by the Court in course of the proceedings, show clearly that the questions referred to (Juris. St. p. 5) were fully and carefully considered by the Court, that in doing so the Court examined the Commission's order in detail, and that it was well satisfied with the Commission's compliance with all legal measurements required of it by statute, case law, and Commission practice and precedent (Notice of Appeal Items 5, 8, 9).

ARGUMENT

I.

There is nothing novel in the first question presented by appellants (Juris. St. pp. 3, 6-10). The question posed assumes conditions that do not prevail herein. Appellants assume that the Commission did not appraise all relevant issues before it in the light of the national transportation policy, whereas, the Commission said:

> "We have, of course, constantly kept in mind our responsibilities under the national transportation policy. It goes without saying that the purpose

of the policy must be considered in all proceedings of the character here presented." (765)[1]

Appellants' argument is posed on the hypothesis that the Commission did not consider the scope and adequacy of any existing services and the effect the instant grants of authority would have upon any such services as may be found to exist; whereas, the Commission carefully considered any and all services that allegedly existed, found them to be grossly inadequate, and found a need for the improved services proposed by the applicants. The question thus assumes that unless the Commission, in determining the ultimate issues of fitness and convenience and necessity, does not also allude in specific terms to the national transportation policy as it goes along, it has been derelict in its duties.

Brief references to the Act would seem to readily negate the appellants' position, for such an interpretation of the statute would not only strain the expressed instructions of the Congress but would seem to nullify them. For Section 207 (a) of the Act (49 U.S.C. § 307 (a)) provides that a common carrier certificate shall be issued if it is found:

(1) *"that the applicant is fit, willing, and able* properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission" and

(a) *"that the proposed service * * * is or will be required by the present or future public convenience and necessity."* (Emphasis supplied)

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[1]Page references are to the Commission's report in 78 M.C.C. 717.

Those are the two ultimate issues that must be determined by the Commission, specifically, in deciding a motor common carrier certificate application.

The term "national transportation policy" appears in only two places in the Motor Carrier Act (Part II of the Interstate Commerce Act). Its first appearance is in section 209 (b) (49 U.S.C. § 309 (b)) with respect to the issue of CONTRACT CARRIER PERMITS, which section is a counterpart to the Certificate Section 207, and relative to Contract Carrier Permits it requires the two ultimates of: (1) fitness; and (2) "that the proposed (contract carrier) operation will be consistent with the public interest and the national transportation policy declared in this Act."

The other appearance of the term, also relative to CONTRACT CARRIER PERMIT matters, is in Section 210 (49 U.S.C. § 310) and requires the Commission to first find any proposed dual operations by one carrier, of both Contract and Common carrier services, to be consistent with the public interest and national transportation policy before such dual status may be permitted.

The National Transportation Policy (49 U.S.C.) precedes the first section of the Interstate Commerce Act, thus serving as a *general policy statement* relative to all transportation matters embraced within the Interstate Commerce Act. The last sentence of the pronouncement reads:

> "All of the provisions of this Act shall be administered and enforced with a view to carrying

out the above *declaration of policy.*" (Emphasis supplied)

The Congress does not appear to have said, then: "Those criteria set forth in section 207 (a) governing the issue of motor common carrier certificates are set at nought and nullified hereby, and the Commission will hereafter determine certificate matters in accordance with the above declaration and without regard to those specific criteria provided in said section." To consider and administer the Act as a whole the Congress seems to have said to the Commission that its regulation of the entire transportation industry of the nation must be in accord with the broad policy set forth in its declared national transportation policy, and when it is faced with a specific problem involving the issue of a motor common carrier certificate it will thereupon base its determinations on two ultimate specifications: fitness; and the present or future public convenience and necessity.

This statement of policy does not confer any authority not specifically conferred by the substantive provisions of the Act, nor would it take it away. Rather, it is a clear statement of the intention of Congress to aid and direct the Commission in its sound interpretation of the provisions of the Act. Hence it is a guide to the Commission, not a formula. The various formulae are set forth in the different parts and sections of the Act itself. The formula with respect to the issue of a motor common carrier operating certificate (not a contract carrier permit) is dual—fitness and public convenience and necessity.

In its disposition of the ultimate issue—public convenience and necessity—the Commission often is faced with sub-issues, such as adequacy and inadequacy of the existing service, interests of competing carriers, improvements in service to the public, advantages and disadvantages to the public, and many others. But none of these are specified in the Act—they are simply inherent in many situations involving convenience and necessity. Admittedly, everything the Commission does must comply with the national transportation policy: *Ann Arbor R. Co. v. United States,* 281 U.S. 658.

In any research on this question one will find many, many cases that have been before the courts and involved the matter of findings relative to the national transportation policy. But with a few exceptions they are all RATE CASES.

This Court is not interested in empty references being made to a statement of policy by the agency. It would seem keenly interested, instead, with whether the essential basis of the Commission's decision is disclosed by its findings and conclusions, and whether it is apparent from the decision that the Commission has appraised the issues in the light of the national transportation policy by which it is always constrained.

This Court has held that if the essential basis of the Commission's judgment is sufficiently disclosed in its report and if the report, when read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting evidence, then it must stand. *Alabama Great Southern R. R. v. United States,* 340 U.S. 216;

Newtex Steamship Corp. v. United States, 107 F. Supp. 388, affirmed per curiam 344 U.S. 901.

The *Alabama Great Southern Case*, supra, involved the prescription by the Commission of a lower rate for a joint rail-barge haul than for an all-rail haul between the same points, and the Court held the Commission was not bound to consider the relative cost of service, observing that the inherent advantage of rail transportation, superior service, was reflected in the higher rate and that competition from inferior barge service could not be remedied by a demand for increase in the rates for the inferior service. Although this was a rate case, the Court dealt rather completely with the "essential findings required of the Commission." The Court observed as follows:

> " * * *. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and *the essential basis of its judgment is sufficently disclosed in its report*. Of course Sec. 14 (1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. *Florida v. United States*, 282 U.S. 194, 215; *United States v. Baltimore & O. R. Co.*, 293 U.S. 454, 464-465. And the basic findings essential to the validity of a given order will vary to the statutory authority invoked and the context of the situation presented. E.g., *United States v. Pierce Auto Lines*, 327 U.S. 515; *North Carolina v. United States*, 325 U.S. 507; *Yonkers v. United States*, 320 U.S. 685; *United States v. Carolina Carriers Corp.*, 315 U.S. 475. * * * And *'the report, read as a whole, sufficently expresses the conclusion of the Commission*, based upon supporting data . . . .' *United States v. Louisiana*, 290 U.S. 70, 80. Enough has been

'put on record to enable us to perform the limited task which is ours.' *Eastern-Central Assn. v. United States*, 321 U.S. 194, 212." (Emphasis supplied)

The *Newtex Steamship Case*, supra, is extremely compelling on this general point. It involved an injunction suit to set aside an I.C.C. order that authorized the Pan-Atlantic Steamship Co. to extend its inland water operations to perform the transportation of freight and passengers between specified Atlantic and Gulf ports and the ports of Houston and Galveston. The Court concluded that the scope of its review was limited to the question of whether the order and report of the Commission encompassed *the ultimate findings required by the statute*, founded upon adequate basic or evidentiary findings which are in turn supported by substantial evidence in the report. The gravamen of the complaint was that the report was fatally defective because basic findings were made and established by the evidence which did not support the ultimate conclusion. The Court held in effect that while the Commission is not required to make formal or detailed findings of fact, it did not mean that findings may be undiscernible, vague or non-existent and abdicated their function to some generalized impression said to be conveyed by the whole report. However, the Court held that statements extracted out of context would not prove fatal to the report when, *reading the report as a whole the essential findings clearly appear*. The Court's own words are more compelling than ours and in part are as follows:

"The *ultimate findings* required by law are that (1) 'The applicant is fit, willing and able properly to perform the service proposed,' and (2) 'The pro-

posed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity.' These findings were explicitly made in terms of the statutory language, and an examination of the report discloses that they are rationally supported by adequate basic findings which are supported by substantial evidence:

" * * * *The question is whether 'the essential basis of (the Commission's) judgment is sufficiently disclosed in its report' and whether '"the report read as a whole sufficiently expresses the conclusion of the Commission, based upon supporting data* * * * ."' *Alabama Great Southern R. Co. v. United States,* 240 U.S. 216, 228. Reading the report as a whole, we think that the essential findings clearly appear. (Emphasis supplied)

Thus this Court's concern has been not with the dogmatics of verbal references, but with the agency's own summary of the evidence, its findings, and that the Commission has appraised the issues in the broad light of the national transportation policy.

Appellants' citations are quite helpful to the position herein expressed. Reference has been made to *Schaffer Transportation Co. v. United States,* 355 U.S. 83 (Juris. St. pp. 7-8). This case involved a motor carrier application where no motor carrier service existed, only rail service; this Court holding that the Commission had not adequately applied the standards of the national transportation policy in denying the motor carrier's application. Therein this Court held that it was apparent that there had been no evaluation made of the "inherent advantages" that might be provided by this initial carrier's services—that where only rail transportation is

presently available the inherent advantages of a proposed motor service becomes a critical factor which the Commission must assess. Without such an assessment one mode of transport would have been provided with unwarranted protection from the competition of others. In the instant case no such issue exists at all.

In the *Schaffer Case* this Court said:

"The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that *this policy is the yardstick by* which the correctness of the Commission's actions will be measured. *Dixie Carriers, Inc. v. United States,* 351 U.S. 56; *Eastern-Central Motor Carriers Ass'n v. United States,* 321 U.S. 194; *McLean Trucking Co. v. United States,* 321 U.S. 67. Of course, the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. *United States v. Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission v. Parker,* 326 U.S. 60. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented *we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made.* Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress. (Emphasis supplied)

* * *

"We do not minimize the complexity of the

task the Commission faces in evaluating and balancing the numerous considerations that collectively determine where the public interest lies in a particular situation. And *we do not suggest that the National Transportation Policy is a set of self-executing principles* that inevitably point the way to a clear result in each case. On the contrary, those principles overlap, and may conflict, and where this occurs, resolution is the task of the agency that is expert in the field. But there is here no indication in the Commission's findings of a conflict of policies. * * * Nor has the Commission properly evaluated the advantages urged by the supporting witnesses to determine whether the standard of public convenience and necessity has been met." (Emphasis supplied)

Appellants cite *American Trucking Ass'n. v. United States*, 344 U.S. 298, but without application (Juris St. p. 9). Therein the Association and others attacked I.C.C. rules promulgated in 52 M.C.C. 675 to govern the lease and interchange of motor vehicles by motor carriers. The Commission's rules were affirmed and found not to be in violation of the national transportation policy (313-314), this Court saying:

"Regulation under the Act is there declared (49 U.S.C. preceding Sec. 1) to be in the interests of the preservation of the inherent advantages of all modes of transportation, and of an economically sound, safe, and efficient industry. See *United States v. Rock Island Motor Transit*, 340 U.S. 419, and *United States v. Texas & Pacific Motor Transport*, 340 U.S. 450. But no overly-nice distinction between law and policy is needed to support the view that the question is hardly one for the courts; it is clear that the rules represent, at best, a compromise between stability and flexibility of industry conditions, each alleged to be in the national interest, and we can only look to see if the Commission

has applied its familiarity with transportation problems to these conflicting considerations."

This case, then, does not say that in such matters the Commission must measure its findings and conclusions with specific references to the national transportation policy.

Cited also (Juris. St. p. 8) is *King v. United States*, 344 U.S. 254, a rate case in which this Court affirmed the Commission's prescription of intrastate railroad freight rates, and in which the Commission had given weight to passenger revenue deficits. This Court said:

> "Sec. 15 a (2) of the Interstate Commerce Act and the National Transportation Policy of 1940 reflect this broad concept of the unity of the nation's transportation system. They direct the Commission to consider, among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service. *It permeates* such general revenue proceedings * * *." (Emphasis supplied).

Nor in this case did the Court say or imply that the Commission must measure the national transportation policy, in specific words, with each factor considered or finding made by it.

Alabama G. S. R. Co. v. United States, 340 U.S. 216, is also cited without discussion. (Juris. St. p. 8). This case put before the Court the question of failure of the Commission to make a finding that barge-rail costs were lower than all-rail costs, in ordering certain rail and barge line carriers to establish joint through rates and routes and prescribing differentials. The Commission

was sustained, this Court holding that the prescription of differentials does not deprive the appellant railroads of their inherent advantages contrary to the national transportation policy. But the case's holding nowhere states nor implies that the national transportation policy must be related in specific terminology to the Commission's findings.

Nor does *United States v. Rock Island Motor Transit,* 340 U.S. 419 (Juris. St. p. 8) mandate the identification of each fact, finding, or conclusion to the national transportation policy in specific terms. It simply holds that under the terms of this policy and of Sec. 5[9] the Commission has the right to make further limitations, restrictions, or modifications in a certificate granted to a rail-owned motor carrier, and "when competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations are the basis * * * for allowing acquisitions of motor routes by railroads * * * ." (434-435)

But what does appear to be decisive on this question is *Luckenbach Steamship Co. v. United States,* 122 F. Supp. 824, affirmed in 347 U.S. 984. The holding of the case is: The Commission is not required to discuss each consideration expressed in the national transportation policy in every decision it renders although such policy must serve as a guide in all its decisions.

The basic findings essential to the validity of a

[9]Involving acquisitions and mergers.

given order will vary with the statutory authority invoked and the context of the situation presented. It is only necessary that the essential basis of the Commission's order appear in its report so that a Court can satisfy itself that the administrative function has been properly performed. The case was an action by Luckenbach to enjoin an order of the I.C.C. that granted a certificate of convenience and necessity to the Isbandtsen Company.

The Court quoted the national transportation policy from 49 U.S.C., preceding Section 1. It then made the following statement:

> "It is clear that this expressed Policy must serve as a guide to the Commission in all its decisions. *United States v. Great Northern R. Co.*, 343 U.S. 562, 576; *McLean Trucking Co. v. United States*, 321 U.S. 67, 82-84. However, it seems equally clear that the Commission cannot and *should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders.* The basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. *Ala. Great S. R. Co. v. United States*, 340 U.S. 216, 288. *It is only necessary that the essential basis of the Commission's order appear in the report* so that a court can satisfy itself that the Commission has performed its function. See *Newtex S. S. Co. v. United States*, 107 F. Supp 388, affirmed 344 U.S. 901; *Capital Transit Co. v. United States*, 97 F. Supp. 614, 621. (Emphasis supplied)

Thus it would seem quite clear that in certificate cases involving the issue of public convenience and necessity (an ultimate issue) the Commission is neither

directed nor required to specifically relate its findings to the national transportation policy, in so many words, as it determines the primary or ultimate issue of public convenience and necessity. Such a conclusion would seem to nullify the meaning and primacy of Section 207 (a).

The matter reverts back to the Court's conclusion in the *Luckenbach* case, supra, that in the context of the total order it is only necessary that the Commission make basic findings essential to the validity of its order so that the Court may be satisfied that the Commission has performed its function. And in the instant order the Commission said: "We have, of course, constantly kept in mind our responsibilities under the national transportation policy." (p. 765)

II.

Appellants next jump to a proffered violation of due process on the erroneous assumption that the Commission has predicated its findings and conclusions upon evidence not of record (Juris. St. p. 8-11). In support of this contention three rate cases were cited (Juris. St. p. 8).

In *North Carolina v. United States*, 325 U.S. 507, the Commission apparently ignored basic evidence adduced in a rate hearing, upon which findings should have been made.

United States v. Chicago M. St. P. & P., 294 U.S. 499 reversed an I.C.C. order disapproving reduced rates

proposed by the railroad, on grounds that the Commission's order left it up to the Court to choose between conflicting inferences and should therefore have been made more precise. This Court said: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." (511)

Robinson v. Baltimore & Ohio Rr. Co., 222 U.S. 506, simply held that no action for reparation for exactions for railroad freight payments could be maintained in any court in the absence of an appropriate finding and order of the I.C.C. The plaintiff therein failed because the complaint did not show that a complaint as to the rate schedule had been filed with the Commission or that the Commission had held it to be discriminatory.

Thus, none of the above cases would seem to be particularly on the point here urged by appellants. For the Commission did, in the EVERTS and INLAND cases, consider hundreds of pages of evidence adduced, make numerous findings therefrom, and did reach definite, unequivocal conclusions.

Other cases cited (Juris. St. p. 9-10) to the effect that findings made without evidence are arbitrary and baseless are good law, when applicable. But appellants' point is lost for lack of a basis in the instant case. That there was adequate evidence underlying each and every finding made by the Commission is evident from the Order attacked, and also found to be so by the reviewing District Court. After forty-four pages reviewing the evidence submitted, the Commission said:

> "To this end we have heretofore reviewed in some detail the supporting evidence as well as that

of the opposing carriers presented in each of the proceedings and have indicated the needs which exist for additional transportation facilities in the several areas involved." (page 761)

Again, at page 762, the Commission said:

"'In reaching these conclusions, we have given separate consideration to the evidence presented in each proceeding and to the arguments and contentions of the parties therein. * * * In arriving at our conclusions as to a need for the service of each applicant, we have, of course, taken into consideration the operating authorities and ability to serve of existing carriers."

Surely neither side could complain of such full and fair treatment.

In their Petitions to the Commission for Reconsideration of the EVERTS and INLAND grants made by Division 1, the appellants made the same allegation as that now made before this Court. The Commission thereafter, by order of March 24, 1958, "reopened these cases for reconsideration on the present records." The Commission obviously took this point seriously, for besides the recitals made (above), it had previously said:

"*One of the contentions* raised in the petitions *is that the division,* in reaching its conclusions in one or more of the proceedings, *used the evidence adduced in other of the cases.* In the circumstances, we will discuss the evidence presented in each proceeding by the applicant and opposing carriers, either separately or together in properly related cases,[5] and follow such discussion by evidentiary findings with respect to the need shown for additional motor service in the light of the shipper testimony and the existing transportation facilities. Having made these determinations, we then will

ascertain which of the applicants shall be authorized to provide the required service. Where operating authority of a carrier is described, it is limited to that pertinent to the matter at hand.

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[5]As Everts, Inland, and Pacific support one another's applications, we shall discuss these proceedings together."[6]

In the light of these repeated assertions by the Commission as to the separate consideration it gave to each of the applications, on their own merits, appellants' second argument seems wholly deflated. It is patent from a reading of the Commission's detailed and lengthy report on reconsideration that it did give separate consideration to each application.

If, for the sake of argument, it could even be assumed that in dealing with such complex problems with the expertise afforded it by the Congress, the Commission did take a long and careful look at the broad matters before it in the final stage of forming its judgment, this Court has spoken clearly, saying in *United States v. Pierce Auto Lines*, 327 U.S. 515 at 529:

> "In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, *in the final stage of forming its judgment*, could not in either case take count of what had been done to the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. * * * Obviously it would be consistent neither with good sense nor, we think with the type of hearing assured by the statute to force the Commission to put on such complete blinders * * *

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[6]78 M.C.C. 720—emphasis supplied.

and, given that the report contains all the essential findings required (citing case) the Commission is not compelled to annotate to each finding the evidence supporting." (Emphasis supplied)

III.

Appellants next complain that the Commission altered the standards used in deciding the EVERTS and INLAND applications[1] (Juris. St. pp. 3, 11).

Well established is the presumption that an administrative agency such as the Interstate Commerce Commission has properly performed its official duties, and this presumption will support its acts in absence of clear evidence to the contrary. This Court thus said in *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, a case involving the validity of a Commission order respecting rates:

> "The Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity and he who would upset the rate order under the act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (512)

There are numerous cases to this effect, such as: *United States v. Chemical Foundation*, 272 U.S. 1, 14-15; *Baltimore & Ohio R. R. v. United States*, 298 U.S. 349.

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[1] This apparently does not apply with respect to the other seven applications disposed of in the same order, as appellants did not bring them in for judicial review even though they include grants of authority dwarfing either of those given to Everts or Inland.

358-359; and *Federal Power Com'n. v. Hope Gas Co.*, 320 U.S. 591, 602.

Even so, the Commission did go to great length in its disposition of the EVERTS and INLAND cases. It considered in detail the substantial evidence adduced in both records (pp. 720-731); it considered the improved services that would ensue from the joint efforts of INLAND, EVERTS, and PACIFIC (pp. 721, 734, 763-764); and made detailed findings on the ultimate issues involved in these two applications at pp. 734-735, 761-768.

In the instant case, no question is raised by the appellants with respect to the Commission's finding of fitness of the applicants. The attack is limited to the Commission's findings on the second test under section 207 (a), namely, its determination that public convenience and necessity requires the services authorized to EVERTS and INLAND. In matters concerning the grant or denial of a certificate of public convenience and necessity the extent of the Commission's authority has been considered many times and is well settled.

Interstate Commerce Commission v. Parker, 326 U.S. 60, provides an oft-quoted interpretation of the term "public convenience and necessity" as used in section 207 (a), at page 65 as follows:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of the government in the regulation of transportation. * * * *The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service*

would serve public convenience and necessity. Cf. *Powell v. United States*, 300 U.S. 276, 287. *This, of course, gives administrative discretion to the Commission,* Cf. *McLean Trucking v. United States*, 321 U.S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * * " (Emphasis supplied)

In *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, this Court stated (at 241):

" * * * The Commission is the guardian of the public interest in determining whether certificates of public convenience and necessity shall be granted. For the performance of that function *the Commission has been entrusted with a wide range of discretionary authority. I.C.C. v. Parker*, 326 U.S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co. v. United States*, 283 U.S. 35, 42; *Alton R. Co. v. United States*, 315 U.S. 15, 23. *Forecasts as to the future are necessary to the decision.* But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here." (Emphasis supplied)

In the 1957 case of *Schaffer Transportation Co. v.*

United States, 355 U.S. 83 this Court reiterated these principles, saying at page 88:

> "Of course, the Commission possesses 'a wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. *United States v. Detroit & C. Nav. Co.*, 326 U.S. 236, 241; *Interstate Commerce Comm'n v. Parker*, 326 U.S. 60."

Thus appellants' argument that the Commission "changed the rules in the middle of the game" are without merit in fact or law.

In *Interstate Commerce Commission v. Union Pacific*, 222 U.S. 541; and *Virginian Rwy. v. United States*, 272 U.S. 658, 665-6; this Court has held that the consistency of the Commission's findings with those made by it in other cases are matters for the Commission alone. In the *Virginian Rwy. Case* (supra) this Court said:

> " * * * To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province." (663)

Reference may also be made to two of appellants' citations: *American Trucking Ass'ns v. United States*, 344 U.S. 298 at 314, where this Court said

> " * * * The mere fact that a contrary position was taken during the war years when active interchange and leasing were required, that the Commission has never before restricted trip-leasing and has in fact approved it from time to time, does not change our function."

and *King v. United States*, 344 U.S. 254, where at page

262 it will be noted that in prescribing railroad freight rate levels the Commission changed its policy and considered the effect of passenger revenue deficits on overall operations and gave weight thereto in making its freight rate prescription.

Appellants may really be complaining of the size of the territorial grants made (Juris. St. p. 10), in that all ten cases involved the area of eleven western states and part of Texas. But the EVERTS' grant involved parts of only three states, and INLAND'S affected the area of parts of only four states. No complaint is made of other grants, such as to:

Pacific Truck Service, Inc.—part or all of five states;

Pacific Intermountain Express Co.—part or all of six states;

Collett Tank Lines (owned by Pacific Intermountain Express)—part or all of eight states;

W. S. Hatch Co.—part or all of nine states;

Clark Tank Lines Company—part of all of nine states;

Canlay & Tanzola, Inc.—part or all of nine states; and

Consolidated Freightways, Inc.—part or all of seven states.

Even so, the above are not unusual grants. The Commission has made many as large or larger in both bulk commodity and territorial scope. For example, only a few are mentioned to demonstrate that there has been no policy change made in the instant grants:

In *York Interstate Tkg. Extension—Chemicals*, 68 M.C.C. 687, twenty-eight state authority was granted

for bulk acids, chemicals, and coal tar products; in *Miller Motor Line of N. C.*, 68 M.C.C. 196, broad acid and chemical authority was granted within the area of six states; and in *Sprout & Davis—Liquid Chemicals*, 69 M.C.C. 507, a broad chemical grant was provided applicant over a 12-statewide area. Other broad grants have been made in recent years by the Commission in such instances as *J. Tom Miller Ext.—Texas*, 68 M.C.C. 543; *Watkins Motor Lines Ext.—Southern States*, 68 M.C.C. 409; *Miller Extension*, 21 M.C.C. 401; *Chambers Ext.—Liquid Commodities*, 69 M.C.C. 347; and many, many others—which indicate that America's economy, traffic, and distribution continues to grow and the Commission is made well aware of it in cases such as these.

IV.

Appellants' fourth question is similar to the second (Juris. St. p. 3) except that it is expressed in the classic terms used to urge judicial review. Unfortunately it is premised on the erroneous assumption that the Commission's findings and conclusions are not supported by substantial evidence of record. Response to this proposition has been rather fully made above under part II of this Argument, to which reference is respectfully made.

It is settled that the Commission adequately performs its duty to make findings if its order enables a reviewing court to ascertain how the Commission reached its ultimate conclusion and if its findings afford a ration-

al basis for the ultimate conclusion. *United States v. Chicago, M. St. P. & P. R.*, 294 U.S. 499, 510-11; *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286-87; *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 164. As this Court put it in the *Mississippi Valley Barge Case* (supra):

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The District Court unanimously found an abundance of substantial evidence, Commission findings in accord therewith, and that the Commission's ultimate conclusion was rationally and lawfully correct.

With substantial evidence before it the Commission has exercised that expert judgment and discretion vested in it by the Congress and the Court, under the Act. It took note, not only of applicants' interests, but primarily of the interests of the public. It found from the evidence that the acid and chemical industry of the West Coast had grown and was continuing in a rapid rate of growth, thus creating new products, new trade movements, new uses, new customers, new plants, and greater transportation needs. It viewed the practical impossibility of these needs being properly and adequately handled by the present trucking facilities without providing much broader operating authorities to those carriers who had already demonstrated a genuine interest in providing the public such services.

In the Everts case: 556 pages of testimony, 42 exhibits offered and 41 received; in the Inland case, 1,278 pages of testimony, 76 exhibits offered and 75 received.

The Commission found little or no chance for impairment, and it was not willing that the public interest be left subservient to the static conditions of an inadequate transportation facility which would stifle the economic growth and welfare of the Pacific Coast's chemical industry and the satellite interests such an industry generates.

Thus the Commission correctly concluded from the evidence before it:

> That the additional services proposed by EVERTS and INLAND would serve useful purposes responsive to public demand;
>
> That such purposes would not be served as well by existing carriers; and
>
> That these purposes would be served by applicants without endangering or impairing the operations of other carriers contrary to the public interest.

This is the time-tested yardstick by which the Commission has measured its certificate problems. (*Kenosha Auto Transport Corp. Extension*, 49 M.C.C. 838; *Pan American Bus Lines Operations*, 1 M.C.C. 190; *Brady Transfer & Sto. Extension*, 47 M.C.C. 1; *Squaw Transit Co.*, 48 M.C.C. 17; *Tristate Transit Co. of Louisiana*, 29 M.C.C. 381; *Spencer Extension*, 29 M.C.C. 73; *Sullivan Extension*, 34 M.C.C. 157; *Chief Refrigerator Truck Lines, Inc.*, 34 M.C.C. 482; *and Santa Fe Trail*, 41 M.C.C. 713).

It is therefore submitted that the Commission's

orders in the EVERTS and INLAND cases were based on findings logically dictated by substantial evidence contained within the records taken.

CONCLUSION

For the foregoing reasons we submit, then, that the decision below is correct and that this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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September, 1959

CERTIFICATE OF SERVICE

I Earle V. White, attorney for Everts' Commercial Transport, Inc., one of appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 18th day of September, 1959, I served copies of the foregoing Motion to Affirm on the several parties to this appeal, as follows:

1. On the appellants, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, to John M. Hickson, Esq., 1225 Failing Building, Portland, Oregon; William B. Adams, Esq., 331 Pacific Building, Portland, Oregon; and, with airmail postage prepaid, to Bryce Rea, Jr., Esq., Munsey Building, Washington 4, D. C.

2. On the United States of America, appellee, by mailing copies, in duly addressed envelopes with airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., and John H. D. Wigger, Esq., Anti-trust Division, Department of Justice, Washington 25, D. C., and by first-class postage prepaid to Clarence E. Luckey, Esq., United States Attorney, U. S. Court House, Portland, Oregon.

3. On the Interstate Commerce Commission, appellee, by mailing a copy in duly addressed envelope, with airmail postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.

4. On Inland Petroleum Transportation Company, Inc., appellee, by mailing a copy in duly addressed en-

velope with first-class postage prepaid, to Albert E. Stephan, Esq., 711 Center Building, Seattle 4, Washington.

EARLE V. WHITE